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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Michael Allen Roth, )  
)  
Plaintiff, )  
v. )  
)  
Town of Quartzsite; )  
Jeff Gilbert and Sondra Gayle )  
Gilbert, Husband and Wife; )  
Officer Fabiola Garcia, #42, and )  
John Doe Garcia, )  
Wife and Husband; )  
Individual Does I-X )  
)  
Defendants )

PLAINTIFF'S RESPONSE TO  
DEFENDANTS' MOTION TO DISMISS

Plaintiff Michael Roth responds to Defendants' Motion to Dismiss.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. Background**

Defendants' have moved to dismiss all but Count 4 in this action claiming: 1) that four of Plaintiff's federal claims (Counts 1,2,3 & 7<sup>1</sup>) are outside the statute of limitations;

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<sup>1</sup> Opposing counsel has sometimes written Count 6 for 7 in her motion to dismiss.

1 2) Plaintiff has failed to state a claim as to Count 5 & 7; and 3) Plaintiff's state claim  
2 (Count 6) is outside state statutes of limitation.  
3

4 Plaintiff will show that Defendants' points One and Three, as to statute of  
5 limitations, fail because Plaintiff, at the time of his arrest on April 13, 2010, did not know  
6 he had been wrongfully arrested or that it was part of a pattern of intentional wrongful  
7 arrest against him and other dissidents until the Appellate court reversed his convictions  
8 stemming from that arrest; because that April 13, 2010 arrest was the first in what would  
9 only later become a clear pattern of arrests, and because the whistle-blowing Quartzsite  
10 police officers and the County Attorney had not yet made their public allegations of  
11 multiple intentional targeting of dissidents by Chief Gilbert.  
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14 As to Defendants' point Two, Plaintiff will show that the Factual Allegations  
15 section of Plaintiff's complaint, which was subsequently incorporated into each cause of  
16 action in the complaint, contained ample factual matter to state a claim for relief in claims  
17 5 and 7.  
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## 21 **II. Plaintiff's § 1983 Claims are timely**

22 What we are arguing here is "What did Mr. Roth know and when did he know it?"  
23 Opposing counsel's dissertation on statute of limitation law is correct that "Under federal  
24 law a cause of action accrues when the plaintiff 'knows or has reason to know of the  
25 injury which is the basis of the action' and that 'the statute of limitations begins to run  
26 when a plaintiff has knowledge . . . 'that he has been hurt . . . '"  
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1 Clearly, Mr. Roth did not know he had been hurt by means of wrongful arrest and  
2 wrongful conviction until December 22, 2011 when the Arizona Court of Appeals found  
3 that the evidence was insufficient to support the convictions, and those convictions were  
4 reversed. Up until that point in time, the acts that Defendants' committed against him,  
5 under color of law, appeared lawful. Indeed, Mr. Roth would not have been able to file a  
6 Notice of Claim with the Town nor file a federal civil rights lawsuit before the Arizona  
7 Court of Appeals ruling, since, at that time, he could not factually claim (let alone know)  
8 he had been injured by means of false arrest, where there was insufficient evidence to  
9 support charges or a conviction. And, as will be further explained below, since that April  
10 13, 2010 arrest was the first arrest of Mr. Roth by the Quartzsite police department, and  
11 since it came before the public disclosures of a concerted and intentional campaign of  
12 wrongful arrests against dissidents, Mr. Roth did not know he was the target of a  
13 conspiracy to use false arrest and false charges to stifle dissent and silence political  
14 dissidents.

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19 **A. Counts 1, 2, 3, 6& 7 were timely filed.**

20 Defendants' rely on *Wallace v. Kato*, 549 U.S. 384, 391-92 (2007). But that  
21 reliance is misplaced for a variety of reasons. First, the Supreme Court's holding in  
22 *Wallace v. Kato* that the statute of limitations begins at arrest, is strictly applied only to  
23 Fourth Amendment violations, as noted by the *Wallace* Court itself, which only had  
24 occasion to consider the applicability of *Heck* to the plaintiff's false arrest claim under  
25 section 1983. *Id.* at 387 n. 1 ("[w]e expressly limited our grant of certiorari to the *Fourth*  
26  
27  
28

1 *Amendment* false-arrest claim ”). Additionally, the language of the Court's ultimate  
2 holding in *Wallace* demonstrates the narrowness of its application. *See id.* at 397 (“the  
3 statute of limitations upon a § 1983 claim seeking damages for a false arrest in violation  
4 of the *Fourth Amendment* ...”). Therefore, *Wallace*’s setting aside of tolling applies, at  
5 most, only to the wrongful arrest claim of Count 2, and does not apply to counts 1, 3, 6,  
6 or 7.  
7

8  
9 The principles of tolling, such as used in *Heck*, clearly also apply to the other  
10 claims by Plaintiff in this case, such as violations of free speech and assembly, First  
11 Amendment retaliation, malicious prosecution, intentional infliction of emotional  
12 distress, and conspiracy, and for much the same reasons, as has been recognized in  
13 numerous cases. One example is the Seventh Circuit’s decision in *Parish v. City of*  
14 *Elkhart*, 614 F.3d 677, where the Court discussed why tolling, based on the date of  
15 conviction, is properly applied to an intentional infliction of emotional distress claim  
16 where there is ongoing violation of rights after the arrest:  
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21 [O]fficers created a fake crime scene, fabricated evidence, tampered with  
22 evidence, destroyed or withheld exculpatory evidence, either actively suborned or  
23 deliberately turned a blind eye to perjured testimony, and testified falsely under  
24 oath, leading to his wrongful conviction. ... looking only at the actions of the  
25 officers, it is clear that this tort was not completed prior to the conviction. The  
26 officers allegedly took steps through all stages of the investigation and trial that  
27 cumulatively amounted to the tort of IIED. Additionally, the conviction was an  
28 essential piece of this tort because it was the wrongful conviction that led to the  
emotional strain and mental anguish that Parish faced. Therefore, unlike the  
claimed tortious conduct in *Johnson*, which was complete immediately after the  
search occurred, Parish's claim of IIED was not complete prior to the time of  
conviction because the conviction was the crux of the claim. Turning to the

1 second part of the analysis, we consider whether the facts alleged to support  
2 Parish's claim of IIED directly attack the validity of the conviction. The *Heck*  
3 Court was explicitly concerned about opening up avenues to challenge a  
4 conviction through means other than the state or federally proscribed channels,  
5 such as habeas corpus. *Heck*, 512 U.S. at 482, 114 S.Ct. 2364. At the heart of  
6 Parish's complaint is a claim that the defendant officers fabricated an entire case  
7 against him that led to his wrongful conviction. The factual allegations that Parish  
8 was innocent and that the officers committed perjury, falsified evidence, coerced  
9 witnesses to commit perjury, and withheld exculpatory evidence are all challenges  
10 to the conviction that would only have been proper while the conviction was still  
11 outstanding if Parish brought them through proscribed post-conviction relief  
12 channels. Therefore, under Indiana's adoption of *Heck*, **Parish could not have  
13 brought these claims until his conviction was disposed of in a manner  
14 favorable to him. Parish brought his claim within two years of when the claim  
15 accrued upon his exoneration, thereby making the claim timely** *Id.* At 683-84  
16 (emphasis added).

17 The behavior of the defendants in this case is similarly ongoing, with the  
18 violations of rights not stopping with the April 13, 2010 arrest, but ongoing thereafter,  
19 and like the plaintiff in *Parish*, Plaintiff Roth could not have brought these claims until  
20 his conviction was disposed of in a manner favorable to him. Roth brought his claims  
21 within two years of when the claim accrued upon his exoneration, thereby making the  
22 claims timely.

23 And because the April 13, 2010 arrest was Roth's first arrest, he could not at that  
24 time see the pattern that would later emerge of repeated arrests. He did not know, at the  
25 time of that first arrest, that it was the beginning of an intentional, planned campaign  
26 targeting of himself and other dissidents in the community with false charges, malicious  
27 prosecution, harassment, suppression and violation of First Amendment rights,  
28 retaliation, and intentional infliction of emotional distress.

That intentional, ongoing campaign of rights violations would only later be  
disclosed not just by the avalanche of arrests, citations, and confrontations, but also by  
the written and oral testimony of ten of the Quartzsite Police Department's own officers,  
who's May 10, 2011 written statement blew the whistle on Chief Gilbert for targeting

1 political opponents, and the later public disclosures by the County Attorney, Sam  
2 Vederman, in his January, 2012 letter to the FBI calling on them to begin an  
3 investigation, where Vederman stated: "I believe the circumstances warrant an  
4 investigation for the following reasons .... Chief Jeff Gilbert has requested felony  
5 charges against certain citizens for which I believe no criminal conduct occurred, or, at  
6 the very least, did not rise to the level of felony conduct" (as noted in the Factual  
7 Allegations section of Plaintiff's Complaint, at paragraph 19).

8 And now additional testimony by the Quartzsite officers has been made available  
9 to Plaintiff, wherein they specifically discuss how Chief Gilbert gave express instructions  
10 to multiple offices that they were to target his political opponents, and opponents of his  
11 allies on the Town Council, for arrest and citations based solely on the fact that they  
12 were political enemies. And that additional testimony also discloses that the officers  
13 were told by a member of the Town Council that Chief Gilbert was being instructed by  
14 sitting members of the Town Council to carry out that campaign of false arrest, false  
15 charges, intimidation and harassment. Plaintiff will include that newly discovered  
16 testimony in an amended complaint which will be filed as fast as possible.

17 Another distinguishing element needed for *Wallace* to control is that, under  
18 Wallace, the Fourth Amendment violation was blatant. So blatant, that on-going  
19 conviction or no, the victim of the Fourth Amendment violation could have known at the  
20 time that he was harmed the moment the violation/false arrest occurred.

21 For example, in Defendants' cite of *Wallace*, Mr. Wallace, a 15 year-old at the  
22 time, had been taken to a police station for questioning, where he had been questioned all  
23 night, without an attorney. The following morning, Mr. Wallace waived his Miranda  
24 rights and "confessed" to a murder.

25  
26 Most crucially, as it distinguishes from Mr. Roth's action, prior to Mr. Wallace's  
27 trial for murder, he attempted to suppress his station house statements as the "product of  
28

1 unlawful arrest." (*Wallace v. Kato*, 549 U.S. 384, 386.) Therefore, even from the  
2 beginning, before he was convicted, Mr. Wallace knew he had been injured via a Fourth  
3 Amendment deprivation.  
4

5 Contrast this to Mr. Roth, who did not know, and could not know, he had  
6 been injured by a false arrest until the Court of Appeals ruled his conviction invalid. The  
7 facts of *Wallace v. Kato*, and subsequent cases, involved gross Fourth Amendment  
8 violations, where the plaintiff would have known there was a blatant violation regardless  
9 of any pending prosecution or later overturning of a conviction, e.g., coerced confessions  
10 and invalid searches. Likewise, the facts of this case allow for the *Heck* exclusion, at  
11 least as to all of the other claims other than false arrest, and perhaps even as to that claim.  
12 There is a good treatise on *Heck* as it applies here in the somewhat similar situation of  
13 *Wilson v. O'brien*, 2011 WL 759939 (N.D.Ill). As the *Wilson* Court noted, In *Heck v.*  
14 *Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994):  
15  
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18 "the Supreme Court held that the limitations period for ' § 1983 cause of action for  
19 damages attributable to an unconstitutional conviction or sentence" does not begin  
20 to run until the conviction or sentence has been invalidated. *Id.* at 489–90. Earlier  
21 in the opinion, the court explained that a state prisoner presents a cause of action  
22 for damages resulting from an unconstitutional conviction when the prisoner's suit  
23 would, if successful, necessarily imply the invalidity of [the plaintiff's] conviction  
24 or sentence [.] *Id.* at 487." (Quoting from *Wilson* at \*5.)  
25

26 Per *Wilson*, *Heck* controls the start of the limitations period for Roth's claims for  
27 deprivation of constitutional rights because a finding in his favor by the Arizona Court of  
28 Appeals would necessarily imply the invalidity of his conviction. Therefore, *Wallace*  
does not control. The statute of limitations for all the Counts in this action started when

1 the Court of Appeals overturned Mr. Roth's convictions. That is when Mr. Roth had  
2 minimal factual knowledge that he had been injured as a result of Defendants' actions.

3  
4 Just as Wallace cannot preclude a Fourteenth Amendment claim (which  
5 Defendants' do not dispute), neither can Wallace preclude a First Amendment claim, a  
6 claim for intentional emotional distress, retaliation, or conspiracy.

7  
8 And even as to Claim 2, for false arrest, the facts of this case can be easily  
9 distinguished from Wallace, since there was no clear violation at the outset. The purpose  
10 of tolling is to permit the Plaintiff a chance of remedy for violation of rights, and that  
11 purpose should be fulfilled here, where he did file a claim two years after he became  
12 aware of the violations upon the reversal of his convictions, and the subsequent factual  
13 evidence by whistle-blowing police officers.  
14

15 **B. Counts 5 & 7 - Failure to Supervise and Conspiracy, Are Amply**  
16 **Supported by the Factual Allegations Section of the Complaint**  
17

18 Defendants' erroneously contend that Counts 5 and 7 of the Complaint fail to  
19 contain sufficient factual matter to state a claim, and that they are merely “threadbare  
20 recitals of the elements of a cause of action,” that Plaintiff’s municipal liability claim  
21 provides only “broad, conclusory statements” and that “Plaintiff has not alleged any non-  
22 conclusory facts that support his conspiracy claim.  
23

24  
25 Defendants’ have apparently failed to notice that the Factual Allegations section of  
26 Plaintiff’s complaint, which was subsequently incorporated into each cause of action in  
27 the complaint, contained ample factual matter to state a claim for relief in claims 5 and 7,  
28



1 including quotations from the written statement by the ten Quartzite police officers  
2 stating that Chief Gilbert ordered them to cite and arrest people for political reasons. As  
3 the Officers' statement, submitted to the Town Council stated:  
4

5 **"He runs license plates just to find out names of people whose vehicles are**  
6 **parked at businesses/residences of people he doesn't like. Not for an**  
7 **investigation, but to gain personal Information about people for his political**  
8 **benefit. He runs criminal history reports through NCIC to try to find "dirt"**  
9 **on candidates or citizens supporting the candidates he does not like .... He**  
10 **orders officers to pull over and arrest/cite violations of citizens he feels are**  
11 **against him or he doesn't like. Not because they have committed a violation**  
12 **that he wants enforced equally, but because it is someone he doesn't like.**  
13 **Clearly this is a misuse of his power."**

14 As the Factual Allegations Section of the Complaint noted, the full text of that letter is  
15 available online at [http://www.scribd.com/doc/59823583/Quartzsite-Police-Officers-](http://www.scribd.com/doc/59823583/Quartzsite-Police-Officers-Association-Letter-regarding-Police-Chief)  
16 [Association-Letter-regarding-Police-Chief](http://www.scribd.com/doc/59823583/Quartzsite-Police-Officers-Association-Letter-regarding-Police-Chief).

17 That Factual Allegations section also quoted the County Attorney's letter to the FBI:

18 **"I believe the circumstances warrant an investigation for the following**  
19 **reasons .... Chief Jeff Gilbert has requested felony charges against certain**  
20 **citizens for which I believe no criminal conduct occurred, or, at the very**  
21 **least, did not rise to the level of felony conduct: Russell Sias (Aggravated**  
22 **Assault on a Peace Officer), Jennifer Jones (Influencing a Witness), Michael**  
23 **Roth (Resisting Arrest) and Ed Foster (Obstructing a Criminal**  
24 **Investigation) .... The Town, through Councilwoman Patricia Anderson,**  
25 **publicly criticized this office for declining to prosecute Michael Roth for an**  
26 **incident that took place at a Town Council meeting in June 2011, It is the**  
27 **same incident in Which Chief Gilbert requested this office charge Mr. Roth**  
28 **with felony Resisting Arrest."**

As noted by the Complaint, Mr. Vederman's full letter to the FBI is available online at:  
[http://aview.info/A-View/Library/PDF/La%20Paz/VEDERMAN/Vederman-12-01-03-](http://aview.info/A-View/Library/PDF/La%20Paz/VEDERMAN/Vederman-12-01-03-FBI-letter.pdf)  
[FBI-letter.pdf](http://aview.info/A-View/Library/PDF/La%20Paz/VEDERMAN/Vederman-12-01-03-FBI-letter.pdf).

1 And that same section of the Complaint also noted, beginning at paragraph 22:

2 John Stair, at the time Vice President of the Arizona Conference of Police and  
3 Sheriffs (AZCOPS), spoke on behalf of the ten Quartzsite officers at a Quartzsite  
4 Town Council meeting on June 14, 2011, testifying about the seriousness of the  
5 allegations against Chief Gilbert while quoting from the May 10, 2011 letter by  
6 the Quartzsite officers ( his testimony can be seen beginning at the 36:40 mark of  
7 the video available online at  
8 [http://www.youtube.com/watch?v=R\\_pa3RPsrX8&feature=youtu.be](http://www.youtube.com/watch?v=R_pa3RPsrX8&feature=youtu.be)). At the  
9 42.38 minute mark of the above noted testimony before the Town Council, Mr.  
10 Stair notes that the Town of Quartzsite, in the wake of the allegations against  
11 Chief Gilbert, is not following its own policy of placing an officer on  
12 administrative leave when serious allegations of criminal wrongdoing are brought  
13 against the officer. Mr. Stair urged the Town to place Chief Gilbert on  
14 administrative leave during the pending investigation into the alleged  
15 wrongdoing. 23. Despite the serious allegations brought by the ten Quartzsite  
16 officers against their own Chief, and despite ongoing investigations into the  
17 alleged wrongdoing by Chief Gilbert by the State of Arizona and by the F.B.I, the  
18 Town of Quartzsite, despite having ample knowledge of the above violations of  
19 rights, has not placed Chief Gilbert, or any of the other officers accused of  
20 violating the rights of citizens and accused of criminal wrongdoing, on  
21 administrative leave, or taken any other steps to discipline, supervise, or control  
22 Chief Gilbert to prevent the violations.

23 It is critical to note that in the middle of Mr. Stair's testimony, as can be seen on the  
24 above linked video, several Town Council members got up and left the room, willfully  
25 refusing to even consider his testimony. That presentation of the testimony of Mr. Stair,  
26 and of the Town's subsequent willful refusal to act, presents factual evidence of the  
27 Town knowingly and intentionally refusing to place Chief Gilbert on administrative  
28 leave, or to otherwise take any steps to stop the abuse, or to discipline Gilbert or any of  
the officers still loyal to his unlawful orders, even after the evidence presented by the ten  
whistle-blowing officers, and by Mr. Stair.

Additionally, since the filing of the complaint, Plaintiff has become aware of new

1 information in the form of extensive and detailed Arizona Department of Public Safety  
2 depositions of Quartzsite police officers, who specifically testify that it was Quartzsite  
3 policy – by both Chief Gilbert and members of the Town Council - to "target" Plaintiff  
4 and other dissidents. In the interest of justice, per F.R.Civ.P 15(a)(2), Plaintiff moves to  
5 amend the complaint to incorporate this new information as it relates to Counts 5 and 7,  
6 and to the other Claims.  
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9  
10 **CONCLUSION**

11 As shown, Counts 1,3,5,6 & 7 are clearly controlled by *Heck*, not *Wallace*, were  
12 timely filed, and therefore, not subject to summary dismissal. Count 6, like the federal  
13 counts, was also timely filed and therefore, not subject to dismissal. Even Count 2  
14 should be permitted to go forward as it is distinguishable from the facts in *Wallace* and  
15 other cases of clear knowledge of violations that is not dependent on later revelations or  
16 later reversal of a conviction, as is the case here.  
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18

19 Counts 5 & 7 were amply supported by the Factual Allegations Section of the  
20 Complaint.  
21

22 Defendants' motion to dismiss should be denied, and Plaintiff should be permitted  
23 to file an amended complaint once that amended complaint is submitted to this Court.  
24

25 RESPECTFULLY SUBMITTED this 10th day of July, 2013.  
26

27 By: /s/ Elmer Stewart Rhodes III  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 10<sup>th</sup> day of July, 2013, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing, with a copy thereby being sent by email to Lisa S. Wahlin, attorney for Defendants.

By /s/Elmer Stewart Rhodes III